

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Involuntary
Discharge/Transfer of V. M. (Petitioner)
by Lakeside Heath Care Center of
Dassel (Respondent)

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The Minnesota Department of Health (the Department) initiated this contested case proceeding by issuing a Notice of and Order for Hearing on January 8, 2008. The notice scheduled a hearing in this matter for January 29, 2008, at Lakeside Heath Care Center of Dassel, 439 William Avenue East, Dassel, MN 55325.

Wendy K. Weidener, Regional Ombudsman, Office of Ombudsman for Older Minnesotans, Post Office Box 64971, Saint Paul, MN 55164-0971 appeared as the representative of V. M. (Petitioner). William Ward, Facility Administrator, 439 William Avenue East, Dassel, MN 55325, appeared as a representative of Respondent, Lakeside Heath Care Center of Dassel (Lakeside). The evidentiary record closed on January 29, 2008, at the close of the hearing on that day.

STATEMENT OF THE ISSUES

Whether Lakeside may lawfully discharge the Petitioner, V. M., for her failure to pay for the nursing care services she has received?

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Petitioner, V. M., is an elderly woman who has both memory and cognitive impairments that impede her functioning.¹ Also, based upon an assessment of the severity and duration of her impairments, treatment

¹ Exhibit 1; Testimony of William Ward.

professionals are of a view that V. M. will require nursing care over the long term.²

1. V.M. was admitted to Lakeside in early 2001.³

2. Apart from Social Security benefits, V. M. does not have any independent source of income.⁴

3. The Petitioner's daughter, Yvonne P., holds a power of attorney that empowers her to handle V. M.'s financial affairs.⁵

4. On or about January 25, 2001, Yvonne executed an Admissions Agreement with Lakeside for the provision of nursing care services to V. M. The Admission Agreement states that Yvonne, as the "Responsible Party," agrees:

To pay all balances lawfully due to the Home, if any, from probate sources (Social Security, Rental Income, Pensions, Insurance, etc.) in the amount designated by the Medicaid caseworker. Payment is to be in advance and no later than the 6th of each month, unless special arrangements are made with the home.

. . .

A responsible party who has signed the admission contract and fails to make timely payment of the facility obligation, fails to make timely Medical Assistance application, or knowingly fails to spenddown the resident's assets appropriately for the purpose of obtaining Medical Assistance, then the responsible party shall be liable to the facility for the resident's costs of care which are not paid by Medical Assistance.

Exhibit A at 2-3. *Compare also*, Minn. Stat. § 144.6501(4)(a) (2006) ("Nursing home admission contracts").

5. On or about August 1, 2007, it became apparent to Lakeside officials that there were not sufficient resources in V. M.'s estate to cover the monthly costs of her care.⁶

² *Compare*, Exs. 1 and 2 at 6.

³ Test. of W. Ward; Ex. A.

⁴ *See*, Ex. C.

⁵ Test. of W. Ward; Testimony of Yvonne P.

⁶ *Id.*

6. Further, due to a determination of the Minnesota Department of Human Services, V. M. is not now eligible for Medical Assistance benefits, and will not be eligible until on or around March 1, 2008.⁷

7. On or about December 3, 2007, Lakeside sent a Notice of Discharge to V. M.'s daughter, Yvonne, stating that the facility intended to discharge V. M. because the cost of the Petitioner's care was not being paid. Facility Administrator William Ward, wrote:

After patiently waiting for resolution of the payment issue with your mother, we have now been advised that your Medical Assistance appeal with Meeker County Social Services has been denied.

As of December 3, 2007, the outstanding balance on [V. M.'s] account is \$10,273.57, but we do anticipate receipt of her Social Security payment as usual, so the arrears amount will be in the neighborhood of \$8,000. With no plan for payment, and no sign of this shortage ending, Lakeside is unable to continue to provide care to your mother while receiving payment at a rate very far below our actual costs of service. Therefore, we have no choice but to terminate our care relationship with [V. M.] on January 4, 2008.

The responsibility for locating alternative placement and arranging [transportation] for her to that location is yours.

. . .

You have the right to seek the assistance of the Ombudsman for Long Term Care

I am hopeful for a quick resolution of this issue and the ability to retain [V. M.] here at Lakeside. However if that is not the plan, please advise your intentions so that we can prepare her for departure.⁸

8. Because of her cognitive impairments, Mr. Ward did not provide V. M. with a copy of the Notice of Discharge. At the evidentiary hearing in this matter, Mr. Ward expressed the view that to have provided such a notice to V. M. would have bordered on abusive conduct.⁹

⁷ See, Exs. C and D; Test. of W. Ward.

⁸ See, Ex. C.

⁹ Test. of W. Ward.

9. As of January 28, 2008, V. M. had incurred arrearages for her care in the amount of \$10,243.48.¹⁰

10. There is no evidence in the hearing record that Lakeside has begun an orientation to ensure the safety and orderly transition of V. M. to a new residence.¹¹

11. There is no evidence in the hearing record that discharge planning for V. M. has substantially progressed or been completed. At the evidentiary hearing in this matter, Mr. Ward expressed the view that, given the poor payment history, and V. M.'s ineligibility for Medical Assistance, it would be futile for him to inquire of other facilities as to whether they would accept V. M. for care. In Mr. Ward's view, without the resources to pay for her care, no other facility would accept a transfer of V. M. from Lakeside.¹²

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

Minnesota and federal law authorize the Administrative Law Judge to: (a) conduct this proceeding; (b) make recommendations to the Commissioner as to whether Lakeside's proposed discharge of the Petitioner meets the requirements of the law; and (c) make findings, conclusions, and orders that are related to this appeal.¹³

1. Lakeside is a "facility" within the meaning of 42 C.F.R. § 483.5 (a) and is therefore subject to the requirements imposed by federal law relating to the discharge or transfer of any of its residents.¹⁴

2. V. M. is a resident of Lakeside within the meaning of 42 C.F.R. § 483.12 and is therefore entitled to the rights created by federal law relating to any transfer or discharge by Lakeside.

3. The Regional Ombudsman, on behalf of V. M., filed a timely appeal of Lakeside's notice of discharge.¹⁵

¹⁰ See, Ex. B.

¹¹ Compare, Test. of William Ward.

¹² Test. of William Ward; Exs. B, C and D.

¹³ See, 42 U.S.C. §§ 1395i-3 (e) (3) and 1396r (e) (3) (2006); 42 C.F.R. §§ 483.12 and 483.204 (2007); Minnesota Statutes §§ 14.50 and 144A.135 (2006).

¹⁴ See generally, 42 C.F.R. § 483.5 (a) (2007).

¹⁵ See, Notice and Order of Hearing, at 2.

4. Under federal law, one legal basis for discharging a resident from a facility is that “the resident has failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility”¹⁶

5. Before a Medicare-certified long term care provider may involuntarily discharge a resident, however, the facility must notify the resident, and if known, a family member or legal representative of the resident, of the proposed discharge.¹⁷ A nursing facility must issue the required notices at least 30 days before the resident is scheduled to be discharged.¹⁸ Further, the facility must communicate this information in a language and manner that the recipients of the notice understand.¹⁹ Lastly, the notice must specify both the location to which the resident will be transferred and the resident’s right to appeal the discharge decision.²⁰

6. Similarly, Minnesota’s “Bill of Rights” for nursing home residents provides in part:

Residents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility. This notice shall include the resident's right to contest the proposed action, with the address and telephone number of the area nursing home ombudsman pursuant to the Older Americans Act, section 307(a)(12). The resident, informed of this right, may choose to relocate before the notice period ends. The notice period may be shortened in situations outside the facility's control, such as a determination by utilization review, the accommodation of newly-admitted residents, a change in the resident's medical or treatment program, the resident's own or another resident's welfare, or nonpayment for stay unless prohibited by the public program or programs paying for the resident's care, as documented in the medical record²¹

¹⁶ See, 42 C.F.R. § 483.12 (a) (2) (v) (2007).

¹⁷ See, 42 C.F.R. § 483.12 (a) (4) (i) (2005); *In re Involuntary Discharge or Transfer of J.S. by Hall*, 512 N.W.2d 604, 610 (Minn. App. 1994).

¹⁸ See, 42 C.F.R. § 483.12 (a) (5) (2007).

¹⁹ See, 42 C.F.R. § 483.12 (a) (4) (i) (2007).

²⁰ See, 42 C.F.R. §§ 483.12 (a) (6) (iii) and (a) (6) (iv) (2007).

²¹ See, Minn. Stat. § 144.651 (29) (2006).

7. Under Minnesota law, Lakeside must prove facts that are required by law to support its discharge of V. M. by a preponderance of the evidence.²²

8. Lakeside has the burden of proof in this proceeding to establish by a preponderance of the evidence that V. M. has failed, after reasonable and appropriate notice, to pay for her stay at Lakeside.²³

9. Lakeside has provided to V. M.'s daughter, Yvonne, reasonable and appropriate notice of all monthly charges for V. M.'s care and of the arrearages that have resulted from the failure to pay those charges.²⁴

10. Lakeside has proved by a preponderance of the evidence that V. M., and those responsible for making payments for V. M.'s care, have failed to pay for V. M.'s stay at Lakeside's facility. As a result, V. M. may be subject to discharge from the facility.²⁵

11. There is no evidence in the hearing record suggesting that Lakeside has fulfilled the requirement of giving meaningful, personal notice to V. M. of the discharge plan.

12. The December 3, 2007 letter of William Ward does not specify a location to which V. M. will be discharged, as required by 42 C.F.R. § 483.12(a)(6)(iii).²⁶

13. Under 42 C.F.R. § 483.12(a)(7), "[a] facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."

14. Under 42 C.F.R. § 483.20(l)(3), whenever

the facility anticipates discharge, a resident must have a discharge summary that includes ... [a] post-discharge plan of care that is developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment.

15. There is no evidence in the hearing record to the effect that Lakeside has completed (or substantially completed) reasonable discharge planning on V. M.'s behalf.

²² See, Minn. R. 1400.7300 (5) (2006); *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604,610 (Minn. App. 1994).

²³ Compare, Minn. R. 1400.7300 (5) (2007).

²⁴ Compare, Testimony of William Ward and Yvonne P. with Minn. Stat. § 144.6501 (4)(d) (2006) (Under nursing home admission contracts "[t]he facility must issue timely billing, respond to questions, and monitor timely payment").

²⁵ See, Ex. C.

²⁶ *Id.*

16. Despite an appeal that was filed just prior to V. M.'s scheduled departure,²⁷ there is no evidence in the hearing record that Lakeside has provided the needed orientation so as to ensure V. M.'s safe and orderly discharge from the facility.

17. The December 3, 2007 Notice of Discharge did not include a "statement that the resident has the right to appeal the action to the State," as required by 42 C.F.R. § 483.12(a)(6)(iv).

18. Based upon the current record, there is genuine doubt that V. M.'s medical and personal needs can be adequately met following her discharge.

19. Under the current circumstances, Lakeside may not lawfully discharge the Petitioner from its nursing facility.

20. The Memorandum that follows explains the reasons for these Conclusions, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Conclusions.

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner:

- (1) **GRANT** the Petitioner's appeal; and,
- (2) **DENY** Lakeside's current request to discharge V. M., without prejudice to Lakeside's right to re-issue a subsequent and conforming Notice of Discharge following the receipt of the Commissioner's Final Order.

Dated: February 11, 2008

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

²⁷ Compare, Notice and Order of Hearing, at 2.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Sanne Magnan, Commissioner, Minnesota Department of Health, Attention: Appeals Coordinator, 85 East Seventh Place, P.O. Box 64970, St. Paul, MN 55164-0970, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

As the result of amendments to the Omnibus Budget Reconciliation Act of 1987,²⁸ a long term care facility that has been certified as a Medicare provider may involuntarily discharge a resident only in specified situations, and then, only after certain statutory and procedural requirements have been satisfied. As a general matter, the law permits discharge of a resident when the resident has failed, after reasonable and appropriate notice, to pay for his or her stay at the facility.²⁹ The issue in this contested case proceeding is whether Lakeside may proceed with discharging the Petitioner following her nonpayment.

Under OAH rules, the party to a contested case proceeding that proposes a certain action be taken must prove the facts at issue by a preponderance of the evidence – unless some other substantive law provides for a different burden or standard.³⁰ In this case, Lakeside proposes to discharge the Petitioner, V. M., from its facility, and therefore bears the burden of proving by a preponderance of the evidence that it has met the legal requirements for discharge.³¹

At the evidentiary hearing, Lakeside presented uncontroverted evidence that, during her stay, V. M. has accrued arrearages for her care in the amount of \$10,243.48. Lakeside also established that it had promptly and contemporaneously given to V. M.'s daughter, Yvonne, monthly statements of account detailing the accumulating arrearages.

These facts begin, but do not conclude, the correct analysis. Under 42 C.F.R. § 483.12 a facility seeking to discharge a resident must provide meaningful notice to the resident of the proposed discharge, specify a location as to which the resident will be discharged, disclose the resident's rights to appeal and engage in "sufficient preparation and orientation" prior to discharge. None of these requirements were fulfilled.

While Mr. Ward credibly argues that providing a copy of the Notice of Discharge to V. M. would – depending upon her condition on the day of receipt – be at best, pointless, or at worst, harmful. Yet, regrettably, the federal regulations do not appear to admit this type of individualized assessment. The Centers on Medicare and Medicaid Services has made the determination, in 42 C.F.R. § 483.12 (a)(4)(i), that all residents, regardless of their condition or

²⁸ See, 42 U.S.C. § 1396r (c) (2) (2006).

²⁹ See, *id.*; 42 C.F.R. § 483.12 (2007).

³⁰ See, Minn. R. 1400.7300 (5) (2007).

³¹ See, *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604,610 (Minn. App. 1994) (the Minnesota Court of Appeals confirms that "a nursing facility proposing to transfer or discharge a resident must prove the supporting facts by a preponderance of the evidence").

limitations, are to receive copies of discharge notices at least 30 days before the resident is to be transferred or discharged.

Moreover, the December 3 notice falls short because it does not detail either the location to which V.M. will be transferred or her rights to appeal this determination.

Lastly, there is no evidence that Lakeside undertook the planning and orientation needed to discharge V. M. Notwithstanding the size, or the duration of V. M.'s unpaid arrearages, which are considerable, Lakeside's announcement that they were willing to prepare her for departure does not fulfill its obligation to "provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."³²

So as to give effect to the federal regulations, the best result is to deny Lakeside's current request for discharge, but to do so without prejudice to its tendering a subsequent Notice of Discharge if V. M.'s arrearages remain unpaid. This Office's prior writings, and the instruction from the Minnesota Department of Health on the discharge process, support this approach. For example, in *The Matter of the Involuntary Discharge of V.M.* (not the resident in this case), the Administrative Law Judge observed:

[F]ederal law requires that even where a resident is discharged for nonpayment, it must perform appropriate discharge planning. Under 42 C.F.R. 483.12 (a)(7), a facility seeking to discharge a resident must engage in 'sufficient preparation and orientation.' While the November 15, 2005 Notice of Discharge states that 'Roseville Good Samaritan Care Center intends to fulfill its legal obligations in performing appropriate discharge planning' there was no evidence presented at the hearing that Roseville had engaged in any prior planning or orientation as required for discharging a resident. Simply relying upon the statement of the Petitioner's representative, Mr. Jones, that he would 'take care of her' does not satisfy the federal requirement.

Roseville has not engaged in the required preparation and so cannot discharge the Petitioner at this time. If Petitioner does not pay the overdue amounts, Roseville can seek discharge again when it has an appropriate discharge plan in place.³³

Similarly, the Department's instruction to Medicare-certified providers has been to the effect that Notices of Discharge are to be re-issued, and the statutory

³² See, 42 C.F.R. § 483.12 (a) (7) (2007).

³³ In *the Matter of the Involuntary Discharge of V.M.*, OAH Docket No. 54-0900-17184-2 at 6 (2006) (<http://www.state.mn.us/ebranch/oah/aljBase/090017184.report.htm>).

time periods reset, if federal requirements are not observed during the discharge process. As noted in Information Bulletin 94-1:

On several occasions facilities have had to reissue the notice of discharge because the notice was not in compliance with the provisions of 42 CFR 483.12 (a)(6). They have then had to provide a new 30 day notice period.³⁴

Granting the present appeal without prejudice to later discharge notices from Lakeside, is the result that best harmonizes the several and competing provisions of state and federal law.

E. L. L.

³⁴ Ex. 3 (Correct Notice Procedure, *Information Bulletin 94-1*, Minnesota Dep't of Health (NH-10 CBC4) (http://www.health.state.mn.us/divs/fpc/profinfo/ib94_1.htm)).